CCBE COMMENTS ON THE PILOT-JUDGMENT PROCEDURE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Conseil des barreaux européens – Council of Bars and Law Societies of Europe
association internationale sans but lucratif
Avenue de la Joyeuse Entrée 1-5 – B 1040 Brussels – Belgium – Tel.+32 (0)2 234 65 10 – Fax.+32 (0)2 234 65 11/12 – E-mail ccbe@ccbe.eu – www.ccbe.eu

CCBE Comments on
the Pilot-Judgment Procedure of the European Court of Human Rights

1. Introduction

The Council of Bars and Law Societies of Europe (CCBE) is the representative organisation of around 1 million European lawyers through its member bars and law societies from 31 full member countries, and 11 further associate and observer countries.

Following the Interlaken Conference and in response notably to paragraph 7(b) of the Interlaken Declaration, the Plenary Court decided at its administrative meeting on 29 March to give a mandate to the Standing Committee on the Rules of Court (Rules Committee) to draft rules on the operation of the pilot-judgment procedure. At a subsequent meeting the Reflection Group (a subgroup of the Council of Europe's Steering Committee for Human Rights), representatives of Governments and civil society expressed the wish to be given an opportunity to make their views on the matter known to the Court. The Registrar at the Court of Justice consulted the Chair of the Rules Committee who agreed to let the registry establish contact with both government agents and NGOs. In this context, the CCBE was invited to write their view on the potential content of the rules on the pilot judgment procedure by 30 June 2010.

The CCBE is grateful for having the opportunity to address its comments on the pilot judgment issue with a view to setting up rules on the operation of this particular procedure.

2. Pilot judgments

With the “Broniowski” Judgment (ECHR 22 June 2004 Broniowski vs. Poland) the European Court of Human Rights established the practice of the “pilot” judgment as a response to breaches revealing structure deficiencies, without specifying the type of general measures the defending State should take, nor suspending the handling of similar cases while waiting for the adoption of such measures.

When the “pilot” case is qualified as such by the Court, all similar demands against the same State are suspended while waiting for general measures to be taken at a national level in order to solve the issue identified by the Court for all relevant individuals.

Accordingly, the Court states the type of measure the State should take, under the supervision of the Committee of Ministers and pursuant to the principle of subsidiarity, in order to prevent a large number of similar cases to be brought before the Court.

The Court, out of concern for subsidiarity, makes national authorities aware of their responsibility through the “pilot” judgment procedure.

The Council of Europe Committee of Ministers recommends all States to ensure domestic redress exists for any individual invoking in a defendable way a breach of the Convention, and to ensure such redress is effective.

It also recommends all States to review, after pilot judgments, the effectiveness of domestic redress, and if necessary to set up effective redress to prevent repetitive cases to be brought before the Court.

The pilot judgment procedure is a very interesting resort, since the retained solution is not only relevant to the sole claimant, but a whole set of individuals who are in the same situation.

This is how enforcing judgments requires general measures at a national level, which should take into account all relevant individuals beyond the case itself in order to solve the systemic flaw which is behind the breach report.

The “pilot judgment” should help the State concerned to find solutions at a national level while sparing the Court from having to consider different cases raising the same issue.

Accordingly, all similar requests should be postponed until the relevant general measures are established .

At the Interlaken Conference, it was pointed out by several speakers that **repetitive cases** arising from **systemic problems** make up a very large part – an excessive part in fact – of the Court case load (and, accordingly, of the Committee of Ministers in its supervising activity for the enforcement of judgments).

According to the Secretary-General of the Council of Europe, it is then necessary to find new responses to the issue, both at national and European levels, through co-operation between both levels, but also between the Council of Europe bodies.

"The Court's innovative pilot judgment and similar procedures represent a very welcome development and should, if at all possible, now be made more transparent and systematic, if necessary by codification in the Convention, or in a future Statute of the Court, the better to ensure their effective operation in future. A system of legally binding preliminary rulings may also have potential to decrease the Court's long-term case load, whether in addition to or instead of advisory opinions to national courts."

3. Issues for consideration when setting up rules on the pilot judgment procedure

The European Court of Human Rights therefore considers including rules on the pilot judgment procedure within its Rules, for which amendments are expected right after the enforcement of Protocol No. 14 (on 1st June).

It is therefore desirable to be very careful about new adopted measures.

The pilot judgment procedure fulfils a wish from the former President of the Court, Luzius Wildhaber (whose view is shared by most judges), who declared that such "leading cases" contribute to Human Rights case law at a European level, and build European "public order".

These judgments replace the Court in its very « constitutional » role, which consist in deciding on mainly "public order" issues.

This technique then aims to clean a large part of Court litigation at the expense of claimants (except that of the pilot judgment!) since they will need to turn to national authorities to win their case, with all well-known consequences (delays, domestic judges' incompetence, legal imprecision's, etc.)

According to the CCBE, this « *pick and choose* » trend in the manner of the Supreme Court of the United States is very dangerous for the future, as this procedure remains in conformity with the principle of subsidiarity, since the choice of means – even exceptionally limited – remains in the hands of the relevant States.

There is somehow a kind of contradiction between the Court injunctive power and the subsidiarity issue.

The use of pilot judgments is limited to the extent that their scope only concerns aspects arising from the circumstances of the case.

If inter-State claims and pilot judgments are considered as useful means against systematic breaches of Human rights, such measures should not prevent individuals whose rights were infringed from receiving individual compensation, including acknowledgement of the breach suffered and financial compensation or other before the Court through a judgment which should gather all pending claims (it should not select one and deem other claims as inadmissible).

The pilot judgment technique has been scarcely used by the Court, so there is a risk in the future in view of the lack of established case law.

Even if the pilot judgment procedure is an opportunity for the Court to show a clear and *objective* balance of shortfalls in domestic regulations, no constraint is provided to oblige the relevant State to take the appropriate measures.

These criticisms also concern the "orienting judgments" and decisions by the Court in Strasbourg which acknowledge some remedy as newly effective – particularly owing to a new line of decisions –

and which result in asking for its exhaustion from the date established by the Court (e.g. the French remedy based on Article L 781-1 of the *code de l'organisation judiciaire* against proceedings which last too much).

The CCBE understands the interest of this particular technique, though it recommends the adoption of a common wording for this procedure, which reinforces its need for codification through a statement within the Court Rules, subject only to the comments mentioned above.